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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA  
IN AND FOR THE COUNTY OF YAVAPAI

STATE OF ARIZONA,

Plaintiff,

vs.

STEVEN CARROLL DEMOCKER,

Defendant.

) No. P1300CR20081339

) Div. 6

) **DEFENDANT'S MEMORANDUM**  
) **REGARDING CONTINUED SIXTH**  
) **AMENDMENT VIOLATIONS DUE**  
) **TO CONDITIONS OF HIS**  
) **CONFINEMENT**

**MOTION**

Defendant Steven DeMocker, by and through counsel, hereby requests that this Court find that his Sixth Amendment rights to effective assistance of counsel, to meaningfully review the disclosure in his case and to assist in his defense are violated by the conditions currently in

1 effect at the Verde Valley Detention Center and that he be provided with relief as requested  
2 below.

### 3 4 **STATEMENT OF FACTS**

5 To date, Mr. DeMocker has been provided with only a fraction of the approximately 31,000  
6 pages of written discovery, more than 200 CDs and DVDs of interviews and videos and images  
7 of multiple hard drives provided by the State, and thousands of pages of defense-generated  
8 information. Because the massive quantity of material generated in this case cannot possibly  
9 be manually reviewed, organized and summarized in the three and one-half months remaining  
10 before trial, it is necessary to either release Mr. DeMocker or utilize computer technology to  
11 facilitate Mr. DeMocker's review of the material if he remains incarcerated pending trial.  
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#### 13 **1. History with the Yavapai County Sheriff's Office.**

14 The defense has attempted to negotiate a solution to Mr. DeMocker's inability to  
15 meaningfully review disclosure and assist in his defense with officials from the Yavapai  
16 County Sheriff's Office in charge of the Verde Valley Detention facility where Mr. DeMocker  
17 is detained. The Sheriff's Office has reversed its decisions on these issues a number of times.  
18 For some period of time Mr. DeMocker was provided access to printed disclosure in his case.  
19 Then, without warning or an acceptable explanation, these materials were removed from Mr.  
20 DeMocker's possession and he was told he would not have access to them.  
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22 Mr. DeMocker and his attorneys were then told that he could only have documents that  
23 would fit in a small plastic tub with him in his cell, which amounted to less than 1500 pages at  
24 a time. His defense team would be responsible for constantly removing documents and  
25 replacing them with others, never exceeding 1500 pages in the aggregate. He was told he could  
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1 not bring any of those documents or even his personal notes with him to court. This remains  
2 the status quo for Mr. DeMocker, despite negotiations between his defense team, the County  
3 Attorney and the Sheriff that extended until early December 2009, when it became clear that  
4 the Sheriff would not make any reasonable changes to his conditions.

5  
6 The situation culminated in the January 12, 2010 representation from Deputy County  
7 Attorney Butner to this Court that the jail would now relent and provide Mr. DeMocker with  
8 access to a computer in a private room where he would be permitted to privately review the  
9 disclosure materials in his case for at least eight hours a day. As a result, this Court issued an  
10 order the next day directing the Yavapai County Sheriff's Office to provide Mr. DeMocker  
11 with access to a password protected computer provided by the defense in a secure and private  
12 room for at least eight hours a day, seven days a week. The Court also directed the Sheriff's  
13 Office to report any reason why Mr. DeMocker should not also be provided access to a secure  
14 and private telephone line in the same room with the computer to permit contact with his  
15 defense team while using the computer. This order was approved as to form and content by  
16 Mr. Butner. On Thursday, January 14, 2010, Deputy County Attorney Fields notified the Court  
17 that Sheriff Waugh refused to comply with the Court's order and, in another reversal, refused  
18 even to provide the access originally agreed to and communicated to the Court through Mr.  
19 Butner.  
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## 22 **2. Proposed Remedy to Sixth Amendment Violations.**

23 Mr. DeMocker should be released and put on GPS or other monitoring. The Court has  
24 already granted bond to Mr. DeMocker. Mr. DeMocker and his family are unable to afford the  
25 bond as it is currently set. The Court can assure Mr. DeMocker's appearance with a lower  
26 bond amount and a combination of conditions previously proposed by the defense.  
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1 If the Court does not release Mr. DeMocker the defense will provide a laptop computer  
2 onto which all of the discovery can be stored or provided in additional external hard drives.  
3 The defense proposes equipping this computer with limited software: Word and WordPerfect,  
4 Adobe Reader, Excel, IPRO, Windows Media Player and a security password. The password  
5 will allow Mr. DeMocker secure access to attorney work product, confidential memoranda and  
6 will preserve the attorney-client privilege. The laptop is an efficient and secure means for Mr.  
7 DeMocker to review the complex documents in this case so that he can meaningfully discuss  
8 the evidence with his defense team.

10 Mr. DeMocker also needs access to a secure and private telephone line to communicate  
11 with his defense team. Mr. DeMocker's current telephone access is inside his jail dorm, is  
12 shared by up to 40 inmates near a television and has limited privacy. Members of Mr.  
13 DeMocker's defense team are located in Phoenix, and in several states, including California,  
14 Washington State, Iowa, Oregon, Georgia, and elsewhere. In the absence of such a secure line,  
15 members of the team would need to travel from Phoenix and these out of state locations to have  
16 multiple meetings with Mr. DeMocker while he has access to the computer outlined above. It  
17 is an efficient and secure solution for Mr. DeMocker to have private telephone access to  
18 communicate with his defense team while he is able to access his case materials on the secure  
19 laptop.

21 Mr. DeMocker is not requesting access to the Internet.

### 23 ARGUMENT

24 As Arizona courts have repeatedly recognized, judges are required to ensure that  
25 defendants have constitutionally meaningful access to counsel. "To be sure, courts have the  
26 inherent authority and obligation to provide relief to defendants from jail regulations or  
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1 decisions by prison administrators that significantly interfere with or unreasonably burden the  
2 exercise of their Sixth Amendment right to access to counsel.” *Arpaio v. Baca*, 217 Ariz. 570,  
3 579, 177 P.3d 312, 321 (Ariz. App. Div. 1 2008) (citing *Cobb v. Aytch*, 643 F.2d 946, 957 (3rd  
4 Cir. 1981) (granting injunctive relief in class action enjoining prison transfers that  
5 “significantly interfered” with pretrial detainees’ access to counsel”); *Wolfish v. Levi*, 573 F.2d  
6 at 133 (2nd Cir. 1978) (granting injunctive relief in class action in which prison regulations  
7 restricting pretrial detainees’ contact with their attorneys were found unconstitutional because  
8 they “unreasonably burdened the inmate’s opportunity to consult with his attorney and to  
9 prepare his defense”), *vacated in part on other grounds* by 441 U.S. 520, 99 S.Ct. 1861, 60  
10 L.Ed.2d 447 (1979)).

11  
12 The Fifth Amendment and its Arizona Constitutional counterparts guarantee every  
13 defendant the right to due process of law. This right includes both the right of access to  
14 counsel and to legal research material. *Smith v. Bounds*, 430 U.S. 817, 821 (1977). The Sixth  
15 Amendment provides that every defendant in a criminal prosecution has the right to counsel  
16 which includes the right to the effective assistance of counsel. *Strickland v. Washington*, 466  
17 U.S. 668, 686 (1984). The right to assist in one’s defense is a corollary of the right to access to  
18 an attorney. “One of the most serious deprivations suffered by a pretrial detainee is the  
19 curtailment of his ability to assist in his own defense.” *Wolfish v. Levi*, 573 F.2d 118, 133 (2d  
20 Cir. 1979), *vacated in part on other grounds*, *Bell v. Wolfish*, 441 U.S. 520 (1979).

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23 **1. Mr. DeMocker’s Fifth and Sixth Amendment Rights Are Being Violated by his**  
24 **Conditions of Confinement.**

25 Mr. DeMocker’s conditions of confinement and the jails’ refusal to permit him meaningful  
26 access to disclosure are violating his due process and Sixth Amendment rights. Mr. DeMocker  
27 has not been provided with access to the disclosure in his case in either paper or electronic form

1 for many months. Instead, the Sheriff has constantly provided the defense with a moving target  
2 in terms of what will be permitted and what access to materials it will provide to Mr.  
3 DeMocker. Occasionally the jail will provide Mr. DeMocker access to some relatively small  
4 number of printed documents. Other times, and without warning, these materials are taken  
5 from Mr. DeMocker. Mr. DeMocker has not been able to review any of the CD or DVD  
6 disclosures to date, nor has he been permitted to listen to any of the hundreds of audio  
7 recordings in his case. He has not been provided with any disclosure at all since June of 2009,  
8 tens of thousands of pages of disclosure ago. Trial is only a little over three months away and  
9 Mr. DeMocker cannot reasonably review, organize and marshal the discovery materials without  
10 access to a computer. The sheer volume of the discovery, as well as the format, provided as  
11 copies of hard drives, CDs and DVDs, require the use of a computer and specialized software  
12 for review. Mr. DeMocker has also not been able to meaningfully communicate with his  
13 defense team. The only telephone access Mr. DeMocker has is in fifteen minute increments in  
14 a noisy, crowded jail dorm with no privacy.<sup>1</sup> He does not have access to the discovery  
15 materials when he has phone privileges and he must share the phone with up to 40 other  
16 inmates. These circumstances completely disrupt Mr. DeMocker's ability to review disclosure,  
17 communicate with his defense team or meaningfully assist in his defense.

21 **2. Release or Provision of a Computer and Secure Telephone Line Are an  
22 Appropriate, Narrowly Tailored Remedy.**

23 This Court should immediately release Mr. DeMocker. Mr. DeMocker's appearance can  
24 be assured by a combination of conditions and GPS monitoring as previously proposed by the  
25 defense. Mr. DeMocker could be limited to the Prescott and Phoenix area and would be able to

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26 <sup>1</sup> It should be noted that the State has disclosed at least two instances where other inmates, having overheard Mr.  
27 DeMocker on the phone, have attempted to trade "information" about Mr. DeMocker for better treatment for  
28 themselves.

1 review the disclosure in his case and communicate as often as necessary with his entire defense  
2 team. Release would ameliorate the conditions of confinement that continue to deprive Mr.  
3 DeMocker of his Sixth Amendment rights.

4       If the court does not release Mr. DeMocker, it must devise an appropriately tailored remedy  
5 to the injuries suffered from the constitutional violations. *Baca v. Arpaio*, 217 Ariz. at 580,  
6 177 P.3d at 322. These issues have arisen in several other cases throughout the country and  
7 defendants are routinely provided with access to disclosure by way of computer. By way of  
8 example, in the Western District of Texas in *United States v. Joey Zollino*, the defendant was  
9 brought to an attorney client interview room at the federal courthouse on a daily basis where he  
10 had access to both paper disclosure and a laptop. The defendant also had unsupervised contact  
11 visits with his counsel. Mr. Zollino was charged with defrauding over one thousand  
12 international investors of hundreds of millions of dollars. In King County Washington in the  
13 city of Seattle, the State, the King County Correctional Facility, Defendant Joel Martin Zellmer  
14 and the Court all agreed that the defendant would have use of a laptop computer provided by  
15 defense counsel and computer discs for 20 hours a week. Anecdotally, defendants in other  
16 Washington State detention facilities have been granted access to computers for discovery  
17 review in the Kitsap County Jail, Yakima County Jail, Sea-Tac Federal Detention Center, and  
18 the Special Commitment Central at Steilacoom. In Portland, Oregon in *United States v.*  
19 *Gilmartin, et al.* where defendants were charged with conspiracy to bribe prison guards and  
20 bring contraband in to a prison, the parties agreed to an arrangement to set up a computer in the  
21 county jail for defendants to view their discovery. These examples are a sampling of the  
22 responses from criminal defense lawyers around the United States who have responded over  
23 the last three days to an inquiry by the Democker defense team. These examples are provided  
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1 here for the purpose of confirming that the relief ordered by this Court is neither unreasonable  
2 nor unique.

3 Accommodations have also been made in cases that have involved jail facilities here in  
4 Arizona. The case with which undersigned counsel are most well acquainted is *United States v.*  
5 *Cisneros* – the case commonly referred to as the New Mexican Mafia case. This case was  
6 initially charged by the United States Attorney in New Mexico. In 2003, with the consent of  
7 the United States Marshal's Service, the 6 defendants all facing the death penalty were allowed  
8 to have cassette players for their use in listening to the tapes of wiretap conversations. The  
9 defendants at that time were housed in a facility utilized by both state and federal pretrial  
10 detainees at the Torrance County Detention Facility in Estancia, New Mexico. Another  
11 defendant in that case who was not death-eligible was also authorized to use a cassette player  
12 while she was housed in the Sandoval County detention facility in Bernalillo County, New  
13 Mexico. Later in 2003, the defendants were authorized to receive seven videotape players with  
14 13-inch monitors to be used by them in reviewing video surveillance in the case. Again, this  
15 was done with the consent of the United States Marshal Service and was done without  
16 opposition from the local jails.

17  
18 Eventually, the United States Attorney relocated the New Mexican Mafia case from New  
19 Mexico to Arizona, and the death-eligible defendants were transferred to the Maricopa County  
20 Jail. Shortly after the transfer of the case to Arizona, the United States District Court of the  
21 District of Arizona ordered that MP3 iPods be acquired for each of the defendants. The iPods  
22 were then loaded with wire tapped transcripts, and the iPods were delivered to the Maricopa  
23 County Jail where the defendants could utilize them on a daily basis. The iPods were  
24 recharged by jail officials on a regular basis.



1 The defense team is also aware of the arrangement entered into with respect to the post-  
2 conviction proceedings in the Timothy Ring case. Mr. Ring, while housed in the Maricopa  
3 County Jail, was provided with a tape recorder and headphones in order to review innumerable  
4 cassette audiotapes for up to eight hours per day.

5  
6 In other cases courts have ordered access similar to that requested here. In *United States v.*  
7 *Poulsen* in the Southern District of Ohio the defendant was provided with a laptop and a  
8 dedicated room at the county jail to review hard copy and electronic documents. The Court  
9 ordered that the jail provide the defendant with access to a private room with these materials for  
10 at least 56 hours a week. Counsel are also advised that in the case of *United States v. Eric*  
11 *Rudolph*, (the so-called Olympic bomber case), Mr. Rudolph was provided with access to a  
12 defense provided laptop computer to review disclosure. In the federal capital prosecution  
13 against Zacarias Moussaoui (*United States v. Moussaoui*, No. 01-455, E.D. Va. 2002), the  
14 federal district court authorized Moussaoui to have access not only to a computer but also to a  
15 secure internet line from the local county jail to a web-based discovery management system  
16 employed by the defense. See, *United States v. Zacarias Moussaoui*, No. 01-455, E.D. Va.,  
17 00455/Index.html, Moussaoui docket entry  
18 #726, 1/24/2003. Defense counsel has also been advised that one or more of the "Montana  
19 Freeman" defendants (D. Montana) were provided electronic discovery on computers  
20 purchased by the defense. The Federal Bureau of Prisons also provides inmates with some  
21 limited computer access, to include the capacity to send and receive electronic messages  
22 without having access to the internet. While no electronic messaging is contemplated or  
23 requested in this case, a correctional facilities ability to provide for safety and security while  
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1 also providing computer access is routine. See

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3 The Sheriff has argued that providing a computer or any other electronic equipment would  
4 compromise the safety and security of the jail. Mr. Democker's attorneys are aware that it is  
5 the position of this Court that it does not wish to interfere with the Sheriff's decisions with  
6 respect to safety and security, but it may be useful to the Court and to the Sheriff to know that  
7 the topic of safety and security with respect to the use of computers has been addressed and  
8 resolved on innumerable occasions in jails, detention facilities and prisons around the United  
9 States. Undersigned counsel have communicated with the court-appointed expert used by the  
10 Federal Court and the Arizona Department of Corrections in the case involving protective  
11 segregation inmates in this state prison. That court expert, Mr. Stephen Martin, has served as a  
12 court-appointed expert in cases across the United States, and has often been retained by the  
13 Department of Justice and by state departments of correction to address questions of safety and  
14 security. Mr. Martin observed that computers have become a "way of life" in our correctional  
15 and detention facilities. Many prisons have computer research capacity for their law libraries.  
16 Many, if not most, juvenile detention facilities have computer training courses to assist young  
17 inmates in becoming proficient in the use of computers. In many (again, if not most) prisons,  
18 computers are used in connection with classroom instruction on a wide variety of topics.  
19 Course materials are routinely made available on CDs that can only be watched and studied  
20 with the aid of computers. Virtually every prison, jail and detention facility that makes  
21 computers available also has some system in place to assure that those who use and have access  
22 to computers and CDs will not dismantle or destroy them in order to turn those educational and  
23 resource tools into weapons. The most common observation tool, of course, is video  
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1 surveillance, but physical observation through glass is also common. Mr. Martin has not heard  
2 of any cases in which the use of computers or other electronic equipment had been denied for  
3 reasons of general institutional safety and security. If the Sheriff or the Court wishes to do so,  
4 Mr. Martin would be more than pleased to confer further about this topic.

5  
6 The suggestion has also been made that the use of a secure telephone line might be abused  
7 by Mr. Democker to make calls other than approved calls to counsel and members of the  
8 defense team. We assume that the Sheriff is quite conversant with the very simple technology  
9 that allows the telephone equipment to be limited to calls to an approved list of telephone  
10 numbers.

11 **CONCLUSION**

12  
13 The Court's January 13, 2010 order is a narrowly tailored solution and should stand.  
14 For these reasons and any adduced from the hearing on this matter, Mr. DeMocker respectfully  
15 requests that this Court find that his due process and Sixth Amendment rights are being  
16 violated by his conditions of confinement and that he either be released or provided with the  
17 computer and telephone access contemplated in this Court's January 13, 2010 order.

18 DATED this 21st day of January, 2010.

19  
20  
21 By: 

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**ORIGINAL** of the foregoing  
filed this 21<sup>st</sup> day of January, 2010, with:

Jeanne Hicks  
Clerk of the Court  
Yavapai County Superior Court  
120 S. Cortez  
Prescott, AZ 86303

**COPIES** of the foregoing hand delivered this  
21<sup>st</sup> day of January, 2010, to:

The Hon. Thomas B. Lindberg  
Judge of the Superior Court  
Division Six  
120 S. Cortez  
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